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IN THE

Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION, *et al.*,
Petitioners,

v.

CHARLOTTE CUNO, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF TAX EXECUTIVES INSTITUTE, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

Pursuant to Rule 37 of the Rules of this Court, Tax Executives Institute, Inc. respectfully submits this brief as *amicus curiae* in support of Petitioners, DaimlerChrysler Corporation, *et al.*[1] Tax Executives Institute, Inc. ("TEI" or "the

[1] Pursuant to Rule 37.6, *amicus* Tax Executives Institute states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. TEI has received the written consents of Petitioner and Respondent to the filing of this brief; those consents have been filed with the Clerk of the Court.

Institute") is a voluntary, non-profit association of corporate and other business executives, managers, and administrators who are responsible for the tax affairs of their employers. The Institute was organized in 1944 under the laws of the State of New York and is exempt from taxation under section 501(c)(6) of the Internal Revenue Code (26 U.S.C.). TEI has approximately 5,700 members who represent more than 2,800 of the leading corporations in the United States, Asia, Canada, and Europe. Institute members represent a cross-section of the business community whose employers are, almost without exception, engaged in interstate commerce. The Institute is dedicated to promoting the uniform and equitable enforcement of the tax laws, reducing the costs and burdens of administration and compliance to the benefit of both the government and taxpayers, and vindicating the Commerce Clause and other constitutional rights of all business taxpayers.

Today, TEI has nearly 600 members within the 4 states of the Sixth Circuit, and a majority of the Institute's other members work for companies whose activities (measured, for example, by property, payroll, or sales) extend into the Sixth Circuit. Moreover, many of these companies have availed themselves of the tax incentives at issue here (or to similarly structured incentives offered by other States). Because this case implicates the constitutionality of every state and local tax incentive and, regardless of its disposition, may markedly affect all U.S. state and local tax systems, it is of interest to all TEI members.

By striking down Ohio's investment tax credit, the U.S. Court of Appeals for the Sixth Circuit upset the settled expectations of companies investing in new plants and equipment in Ohio in reliance on the State's investment tax credit. Further, it deprived Ohio (and similarly situated States) of an important and time-honored mechanism for encouraging job-creating investments. Finally, this case raises fundamental

issues under the Commerce Clause about the States' freedom to compete for interstate commerce and foster economic development within their borders. A writ of certiorari should issue to permit this Court to confirm that the Commerce Clause does not restrict States' efforts to advance legitimate state interests through their tax systems. As individuals who contend daily with the interpretation and administration of tax laws nationwide, the Institute's members—and their employers—have a vital interest in the proper disposition of this case.

SUMMARY OF ARGUMENT

1. Following Ohio's enactment of an investment tax credit to encourage economic development, DaimlerChrysler built a vehicle-assembly plant in Toledo, entitling the company to a credit against Ohio's corporate franchise tax. A taxpayer group challenged Ohio's grant of a tax credit as violating the Commerce Clause of the U.S. Constitution. The U.S. Court of Appeals for the Sixth Circuit agreed, striking down the credit. Should the Court grant the petition for a writ of certiorari to clarify the scope of the Constitution's bar on discriminatory taxes? *Amicus* TEI submits that it should.

2. During the past three decades, this Court has invoked the Commerce Clause to invalidate state taxing schemes that unreasonably burdened interstate commerce by discriminating against out-of-state taxpayers. While the Sixth Circuit was correct to consider those decisions in weighing the constitutionality of the Ohio investment tax credit, it erred in concluding that the Court's jurisprudence mandated striking down Ohio's investment tax credit.

3. In *Boston Stock Exchange v. State Tax Comm'n*,[2] this Court held a New York transfer tax that more heavily taxed stock transfers if they occurred outside the state to violate the

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[2] 429 U.S. 318 (1977).

Commerce Clause. *Boston Stock Exchange* has since provided the lens for reviewing the constitutionality of state taxing schemes.

4. Seven years after *Boston Stock Exchange*, the Court decided *Westinghouse Electric Corp. v. Tully*,[3] a case involving a franchise tax credit. The Court said that it made no difference that a transfer tax was not involved, or that a tax credit was at issue. The tax scheme was constitutionally flawed because the manner in which the credit was computed created a greater tax burden on receipts from out-of-state DISC sales. *Bacchus Imports Ltd. v. Dias*,[4] decided the same year as *Westinghouse*, dealt with a tax exemption from the Hawaii liquor excise tax for certain locally produced alcoholic beverages. The statute on its face did not discriminate against out-of-state distributors, but the Court found that the reciprocal benefit accorded Hawaii's local liquor products and industry violated the Commerce Clause. More recently, in *New Energy Co. of Indiana v. Limbach*,[5] the Court struck down an ethanol tax credit applied against Ohio's motor vehicle fuel sales tax for fuel produced in the state. *New Energy* added the principle to the discriminatory-tax-bar landscape that reciprocity will not remediate otherwise facial discrimination.

5. Against the backdrop of these cases, the Sixth Circuit was called upon to assess whether Ohio's manufacturing investment tax credit crossed the line. Regrettably, the Court of Appeals misapprehended the Court's jurisprudence and improperly invalidated Ohio's investment credit.

6. Not every difference in treatment constitutes discrimination. TEI submits that four distinguishing characteristics of

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[3] 466 U.S. 388 (1984).

[4] 468 U.S. 263 (1984).

[5] 486 U.S. 269 (1988).

Ohio's investment tax credit at issue here render it constitutional: (a) Ohio is not discriminating against products manufactured or business operations performed in any other State, (b) the investment tax credit is not related to discrete transactions and it does not target a particular product or industry, (c) the amount of the credit does not change relative to activities in other states, and (d) Ohio's statute does not discriminate on its face but rather is freely available to any corporation engaging in the prescribed activities in Ohio.

7. Although this Court invalidated the state tax incentives in *Boston Stock Exchange* and the other cited cases, in each case it affirmed the ability of the states to foster economic growth within their borders. The Court observed that the "delicate adjustment" between the national interest in free trade protected by the Commerce Clause and the legitimate interest of States in exercising their power to tax turns on "the unique characteristics of the statute at issue and the particular circumstances in each case."[6] Thus, the distinguishing characteristics of the tax credit at issue are highly significant.

8. Despite the uninterrupted guidance from this Court that the States are not powerless to create incentives to local activities, the Court of Appeals muddled Commerce Clause jurisprudence, potentially leaving every state tax incentive vulnerable to challenge. While the limitations imposed by the Commerce Clause are real, they do not vitiate the power reserved to the States in our federal system. Where a state tax statute (a) is closely tailored to advance a specific, legitimate state interest, (b) does not discriminate on its face (i.e., its effect is readily available to all), and (c) does not directly burden out-of-state interests, it should be sustained.

9. Investment tax credits, along with an array of other tax incentives, are widely used by States to encourage growth in economically distressed areas, spur investment, increase

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[6] 429 U.S. at 329.

jobs, and hence, enlarge the tax base. Left intact, the Court of Appeals' determination will deprive States of the ability to manage their economies and deny taxpayers the certainty they rightly need to plan and conduct their business affairs.

10. Should the result in this case remain unchanged, the existing boundaries within which States have worked for years to promote economic growth through tax incentives will be blurred and the settled expectations of the States and taxpayers will be upended. The Court should review the decision in order to clarify the Commerce Clause's bar on discriminatory taxation and restore certainty to the area.

ARGUMENT

In 1997, Ohio enacted a tax credit to spur capital investment within the State.[7] Any company, whether or not already present in Ohio, could qualify for a 7.5-percent credit against its Ohio franchise tax liability by increasing its investment in manufacturing in the state. Further, capital investment occurring within specifically designated areas was eligible for an enhanced credit of 13.5 percent, thereby allowing the State to target economically depressed areas.

In 1998, DaimlerChrysler added a manufacturing facility to an existing plant in Toledo that satisfied the requirements for the enhanced investment tax credit. In addition, DaimlerChrysler negotiated a 10-year real property tax exemption with the City of Toledo.

In 2000, several Ohio and Michigan taxpayers (collectively referred to as "Cuno") sought declaratory and injunctive relief contending that Ohio's investment tax credit and the property tax exemption were unconstitutional. Specifically, Cuno argued that the preferential treatment accorded in-state investment under Ohio law, as well as the property tax exemption granted by Toledo, discriminated against interstate commerce

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[7] Ohio Rev. Code § 5733.33.

in violation of the Commerce Clause of the U.S. Constitution.[8] The district court dismissed the complaint.[9] On appeal, the Court of Appeals reversed, holding that the investment tax credit violates the Commerce Clause. At the same time, the Court found that Ohio's property tax incentive did not violate the Commerce Clause.[10]

I. THE SIXTH CIRCUIT MISAPPREHENDED THIS COURT'S PRECEDENTS AND MUDDLED ITS COMMERCE CLAUSE JURISPRUDENCE BY STRIKING DOWN OHIO'S INVESTMENT TAX CREDIT

During the past three decades, this Court has invoked the Commerce Clause to invalidate state taxing schemes that unreasonably burdened interstate commerce by discriminating against out-of-state taxpayers. While the Sixth Circuit was correct to consider those decisions in weighing the constitutionality of the Ohio investment tax credit, the court erred in concluding the Court's jurisprudence mandated its decision. Indeed, a careful review of the cases confirms that, while "the scope of the doctrine that bars discriminatory taxes has not been clearly delineated,"[11] the Sixth Circuit distended the applicable precedents in striking down Ohio's investment tax credit.

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[8] U.S. CONST. art I, § 8, cl. 3.

[9] The challenge to the Ohio statute was originally filed in the Lucas County, Ohio, Common Pleas Court, but was removed to the U.S. District Court for the Northern District of Ohio.

[10] App. 1a. "App." references are to the various appendices bound with the Petition for a Writ of Certiorari, *DaimlerChrysler Inc.*, et al. *v. Charlotte Cuno*, et al., No. 04-1704 (filed Jun. 17, 2005). The real property tax exemption is the subject of the Cuno's Petition for a Writ of Certiorari in *Charlotte Cuno*, et al. *v. DaimlerChrysler Inc.*, et al., No. 04-1407 (filed Apr. 18, 2005).

[11] App. at 5a.

In *Boston Stock Exchange v. State Tax Comm'n*,[12] this Court struck down a New York transfer tax that more heavily taxed stock transfers occurring outside the state. A unanimous court concluded that "because it imposes a greater tax liability on out-of-state sales than on in-state sales, the New York tax . . . falls short of the substantially evenhanded treatment demanded by the Commerce Clause."[13] Holding that "no state may discriminatorily tax the products manufactured or the business operations performed in any other state,"[14] *Boston Stock Exchange* has provided the lens for reviewing the constitutionality of state taxing schemes.

Seven years after *Boston Stock Exchange*, the Court took up the issue of discriminatory taxation in *Westinghouse Electric Corp. v. Tully*,[15] a case involving a franchise tax credit. Following enactment of a federal tax law granting preferential treatment to export sales by "Domestic International Sales Corporations" (DISCs), New York amended its tax statute to include income from DISC sales in the income of the parent corporation for New York corporate tax purposes. At the same time, New York provided a tax credit that varied depending on whether the DISC sales originated in New York as well as on the relative proportions of the taxpayer's New York and non-New York DISC sales. It was the credit provisions that prompted the Court to strike down the New York scheme as discriminatory. Citing *Boston Stock Exchange*, the Court said that it made no difference that a transfer tax was not involved, or that a tax credit was at issue. The tax scheme was constitutionally flawed because the manner in which the credit was computed created a greater tax burden on receipts from out-of-state DISC sales.

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[12] 429 U.S. 318 (1977).

[13] *Id.* at 332.

[14] *Id.* at 337.

[15] 466 U.S. 388 (1984).

In 1984, the Court also decided *Bacchus Imports Ltd. v. Dias*,[16] a case involving a tax exemption from the Hawaii liquor excise tax for certain locally produced alcoholic beverages. Although the statute did not facially discriminate against out-of-state distributors, the Court found that the reciprocal benefit afforded to Hawaii's local liquor products and industry violated the Commerce Clause.

Westinghouse and *Bacchus Imports* crystallized the governing principles in this area. Both decisions affirmed the core holding of *Boston Stock Exchange*, and answered some remaining questions. First, the prohibition on discriminatory taxes applies not only to indirect, transaction-based taxes (like the transfer tax in *Boston Stock Exchange*), but also direct taxes, like income taxes. Second, the bar reaches tax schemes providing a tax benefit (credit or exemption) to in-state businesses or operations, as well as state statutes penalizing out-of-state activity. Finally, tax statutes need not be discriminatory on their face to be inimical to the Commerce Clause.

More recently, the Court addressed the constitutionality of a state tax credit in *New Energy Co. of Indiana v. Limbach*.[17] There, the Court addressed a challenge to an ethanol tax credit against Ohio's motor vehicle fuel sales tax for fuel produced in the State. Although the credit was available in a reciprocal fashion for ethanol produced in other States to the extent other States provide a credit for ethanol produced in Ohio, the Court struck it down on the grounds that the Ohio provision "explicitly deprives certain products of generally available beneficial tax treatment because they are made in certain other States, and thus on its face appears to violate the cardinal requirement of nondiscrimination."[18] *New Energy*

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[16] 468 U.S. 263 (1984).

[17] 486 U.S. 269 (1988).

[18] 486 U.S. at 274.

added the principle to the discriminatory-tax-bar landscape that reciprocity will not remediate otherwise facial discrimination.

Against the backdrop of these cases, the Sixth Circuit was called upon to assess whether Ohio's manufacturing investment tax credit crossed the line. While Ohio's investment tax credit was intended to and in fact did provide an incentive to taxpayers to invest in the State, *amicus* TEI submits the statute does not run afoul of the neutrality required by the Commerce Clause. Thus, while the Court of Appeals' attempt to reconcile this Court's decisions is laudable, the court misapprehended the nuances and significance of the Court's jurisprudence. As a result, it erred in invalidating Ohio's investment credit.

TEI submits that distinguishing characteristics of Ohio's investment tax credit enable it to pass constitutional scrutiny. Unlike the circumstances in *Boston Stock Exchange*, Ohio is not discriminating against products manufactured or business operations performed in any other State. Indeed, the credit here does not relate to a transaction tax at all, but rather to the State's franchise tax. The tax credit is also distinguishable from the exemption in *Bacchus* because, first, it is not related to a transactional tax, and second, it does not target a particular product or industry. As for *Westinghouse*, the credit is different because the amount does not change relative to activities in other States. In other words, the Ohio investment tax credit encourages increased investment in the State (like the *Westinghouse* credit), but it does not directly discourage additional investment in other States (unlike the *Westinghouse* credit). Indeed, since the credit applied to Ohio's corporate franchise tax, the tax involved only applies to activities in Ohio.[19] Moreover, although the credit at issue in *Westing-*

[19] The credit in *Westinghouse* varied depending on the relative proportion of the taxpayer's New York and non-New York sales. 466 U.S. at 400.

house was applied against New York's corporate income tax, it was calculated on a transaction-by-transaction basis (*i.e.*, on the basis of DISC sales); here, Ohio's investment tax credit was computed on the basis of the company's investment in plant and equipment. Finally, unlike the statute in *New Energy*, the Ohio tax credit is, again, not transaction based and does not discriminate on its face: It is available to any corporation engaging in the prescribed activities in Ohio, and reciprocity is not an issue.

These distinctions are highly significant given this Court's recognition that States may structure their tax systems "to encourage the growth and development of intrastate commerce and industry" and may "compete with other States for a share of interstate commerce."[20] As the Court observed in *Boston Stock Exchange*, when making the "delicate adjustment" between the national interest in free trade protected by the Commerce Clause and the legitimate interest of States in the exercise of their power to tax, the result turns on "the unique characteristics of the statute at issue and the particular circumstances in each case."[21]

Not every difference in treatment constitutes unconstitutional discrimination. Thus, although this Court invalidated the state tax incentives in *Boston Stock Exchange* and the other cited cases, in each case it also affirmed the ability of the States to foster economic growth within their borders. The Court declared in *Boston Stock Exchange* that the Commerce Clause "does not prevent the States from structuring their tax systems to encourage the growth and development of intrastate commerce and industry."[22] In *Westinghouse*, the Court averred that "[w]e do not hold that a State may not compete with other States for a share of interstate

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[20] *Boston Stock Exchange*, 429 U.S. at 336-37.

[21] *Id.* at 329.

[22] *Id.* at 336.

commerce; such competition lies at the heart of a free trade policy,"[23] and elaborated in *Bacchus* that "[a] State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry."[24] And in *New Energy*, the Court confirmed that the Commerce Clause "does not prohibit *all* state action designed to give its residents an advantage in the marketplace."[25]

This Court's decisions teach that where a state tax statute (a) is closely tailored to advance a specific, legitimate state interest, (b) does not discriminate on its face (i.e., its effect is readily available to all), and (c) does not directly burden out-of-state interests, it should be left intact. Where both in-state and out-of-state companies are eligible to receive investment tax credits, as in this case, the Commerce Clause should not preclude such incentives. In other words, tax incentives should be sustained so long as they do not penalize out-of-state activity. Since any taxpayer, including non-domiciliary companies such as DaimlerChrysler here, may avail itself of the benefits afforded by the Ohio investment credit, the credit should be sustained. This is the essence of the free-trade and open competition that the Commerce Clause should permit while guarding against predatory and discriminatory state practices.

Despite the uninterrupted guidance from this Court that the States are not powerless to create incentives to local activities, the Court of Appeals fashioned a decision that muddles Commerce Clause jurisprudence and potentially leaves every state tax incentive vulnerable to challenge. Indeed, since the Sixth Circuit rightly upheld the property tax exemption that DaimlerChrysler claimed regarding the new plant and equipment, while striking down the investment tax credit, it is

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[23] 466 U.S. at 407 n.12.

[24] 468 U.S. at 271.

[25] 486 U.S. at 278 (emphasis added).

difficult to fathom what type of incentives might survive scrutiny.

In summary, while the limitations imposed by the Commerce Clause are real, the Clause does not vitiate the power reserved to the States in our federal system. Nearly all states have some type of tax incentive to encourage in-state economic activity, and more than 30 offer an investment tax credit analogous to Ohio's. In California, for example, placing into service qualifying property after January 1, 1994, yielded a manufacturer's investment credit for many taxpayers.[26] In Illinois, taxpayers may claim a credit in respect of qualifying property placed in service between July 1, 1984, and January 1, 2004.[27] And in New York, an investment tax credit related to qualifying property acquired after December 31, 1968, is available to taxpayers.[28] These are but three examples of investment tax credits; by one recent survey, more than 330 income or franchise tax incentives exist.[29] More fundamentally, the Court of Appeals decision implicates even the most neutral (and basic) tax policy decisions, such as lowering a tax rate or narrowing a tax base compared with other states, as "discriminatory." Accordingly, it is critical for this Court to take up this case and reverse the decision below.

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[26] Cal. Rev. & Tax. Cd. § 23649(a)(1). The California credit is not available for property placed in service after January 1, 2004.

[27] Ill. Admin. Code 86 § 100.2101(a).

[28] N.Y. Tax Law § 210(12).

[29] Timothy H. Gillis, *Sixth Circuit Bans Ohio Tax Credit Under the Dormant Commerce Clause, Casting a Pall on Incentives*, 101 J. Tax'n 359, 360 (2005) (citing Mark L. Nachbar, *Credits and Incentives: Alabama Through Hawaii*, 1450 T.M. (BNA) (2005)).

II. LET STAND, THE DECISION BELOW WILL REVERBERATE THROUGH THE ECONOMY, UPENDING SETTLED EXPECTATIONS OF BOTH BUSINESSES AND THE STATES

Investment tax credits, along with an array of other tax incentives, are widely used by states to encourage growth in economically distressed areas, spur investment, increase jobs, and hence, enlarge the tax base. If not reversed, the Court of Appeals' determination will reverberate through the Sixth Circuit and across the country to the detriment of taxpayers and States alike. States will be denied the ability to manage their economies and taxpayers will be deprived of the certainty they rightly need to plan and conduct their business affairs.

The importance of Ohio's investment tax credit is beyond dispute: In this case alone, it spurred the creation or retention within the State of more than 4,000 jobs and prompted a $1.2 billion expansion by DaimlerChrysler.[30] In 2004, Ohio's Development Director worked with more than 193 companies to expand or locate in Ohio, representing more than 53,000 jobs in Ohio.[31] And Ohio is not just competing with other States: It, like other States, faces increasing competition from Canada, Mexico, and Asia to secure and retain businesses. Ohio, through this credit, is simply pursuing a tax policy strategy to encourage investment within its borders and boost its economy.

Should the result in this case remain unchanged, the existing boundaries within which States have worked for years to promote economic growth through tax incentives will be blurred and the settled expectations of the States and tax-

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[30] Bruce Johnson, Testimony before the Subcommittee on the Constitution of the Committee on the Judiciary, United States House of Representatives (May 24, 2005) (transcript available in TEI's offices).

[31] *Id.*

payers upended. Not only will taxpayers that have detrimentally relied on the states' actions be severely disadvantaged, but the attendant uncertainty will discourage further investment by other taxpayers and thus frustrate the States' incentive efforts. The Court should review the decision in order to clarify the Commerce Clause's bar on discriminatory taxation and restore certainty to the area.

CONCLUSION

For the foregoing reasons, the Court should grant DaimlerChrysler's Petition for a Writ of Certiorari and reverse the decision below invalidating Ohio's investment tax credit.

Respectfully submitted,

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